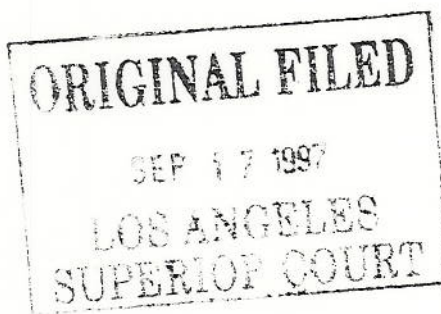


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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
CENTRAL DISTRICT

FRANK MANCUSO, SR., an individual,

Petitioner,

v.

CALIFORNIA STATE COASTAL CONSERVANCY,
an agency of the State of California, CALIFORNIA
STATE COASTAL CONSERVANCY BOARD, the
governing body of the California State Coastal
Conservancy, the CALIFORNIA DEPARTMENT
OF GENERAL SERVICES, an agency of the State
of California, THE MOUNTAINS RECREATION
AND CONSERVATION AUTHORITY, an agency of
the State of California and DOES 1 through 100,

Respondents.

BS 040197

(Petition assigned to Judge
O'Brien)

STATE COASTAL CONSERVANCY, DEPARTMENT OF GENERAL SERVICES
AND MOUNTAIN RECREATION AND CONSERVATION AUTHORITY
MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE
PETITION FOR WRIT OF MANDATE

Hearing: Sept. 23, 1997
Time: 9:30 A.M.
Dept.: 85

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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
10 CENTRAL DISTRICT
11

12 FRANK MANCUSO, SR., an individual,

13 Petitioner,

14 v.

15 CALIFORNIA STATE COASTAL
CONSERVANCY, an agency of the State of
16 California, CALIFORNIA STATE COASTAL
CONSERVANCY BOARD, the governing body of
17 the California State Coastal Conservancy, the
CALIFORNIA DEPARTMENT OF GENERAL
18 SERVICES, an agency of the State of California,
THE MOUNTAINS RECREATION AND
19 CONSERVATION AUTHORITY, an agency of the
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20 Respondents.
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BS 040197
(Petition assigned to Judge
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STATE COASTAL
CONSERVANCY,
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MEMORANDUM OF POINTS
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22
23 INTRODUCTION AND SUMMARY OF ARGUMENT
24

25 This case involves Frank Mancuso, the owner of a large beachfront lot in Malibu,
26 and the State Coastal Conservancy. Mr. Mancuso's property is burdened by a ten foot wide
27 public access easement running along its edge and the edge of an adjacent parcel of property
28 from Pacific Coast Highway to the mean high tide line of the Pacific Ocean (hereinafter the

1 "Easement"). The State Coastal Conservancy is the holder of that easement on behalf of the
2 People of California.

3 The essential act upon which this suit is based is a determination by the
4 Conservancy to authorize the expenditure of funds for a contract with an individual, Charles
5 Rauw.^{1/} The contract's purpose was the collection of data on the cost of making
6 improvements to the Easement necessary to allow the public to safely pass from Pacific Coast
7 Highway to the mean high tide line. At the time this data collection was authorized, the
8 Conservancy had only limited funds available for the development of the Easement. Thus,
9 before committing itself to the cost of a major study of the impacts of developing the
10 Easement, the Conservancy wanted to know if it could afford to even build the Easement's
11 essential infrastructure. Simply put, the Conservancy wanted to know if it could afford to
12 build the Easement before it even began the more expensive and time consuming process of
13 deciding whether it would be appropriate to do so.

14 Mr. Mancuso asserts that the Conservancy and the Department of General Services
15 ("Department") were required to adopt notice procedures pursuant to Public Resources Code
16 section 31107.1 for a determination such as this and that this Court should compel the
17 Conservancy and the Department to do so.

18 In addition, petitioner argues that the Conservancy failed to meet its duties and
19 responsibilities under the California Environmental Quality Act, Public Resources Code
20 section 21000 et seq. (hereinafter "CEQA") when it determined to authorize funds for this
21 data collection.

22 Contrary to petitioner's apparent belief, Public Resources Code section 31107.1 has
23 no application to an authorization such as this. That section, on its face, applies only to the
24

25 1. Petitioner filed a first amended petition on or about November 29, 1996 adding the Mountains
26 Recreation and Conservation Authority ("MRCA") as a respondent. The MRCA was added because petitioner
27 wished to challenge the validity of a proposed contract for maintenance of the easement at issue in this
28 proceeding which was to be executed between the Conservancy and the MRCA. That contract was never
executed by the MRCA and, as conceded by petitioner, the Conservancy withdrew its authorization for entering
into such a contract with the MRCA on January 23, 1997. As a result, any cause of action against the MRCA
or the Conservancy on the basis of the proposed contract has become moot.

1 development and implementation of procedures for "land acquisition, leasing, options to
2 purchase, land disposal and other property transactions". An authorization to collect data is
3 simply not a "property transaction".

4 Furthermore, even if section 31107.1 applied to an authorization to collect data,
5 neither the Conservancy or the Department have the legal authority to adopt notice procedures
6 such as petitioner requests. In asking this Court to compel the Conservancy and the
7 Department to adopt notice procedures for section 31107.1 transactions, Mr. Mancuso has
8 sought to compel these agencies to adopt standards of general application. Such standards
9 are regulations within the meaning of Government Code section 11342(g) and must be
10 approved by the Office of Administrative Law ("OAL") after a lengthy, expensive and time-
11 consuming review process. OAL, in turn, under Government Code section 11349.1, may
12 refuse to approve any regulation which, among other things, it finds is unnecessary or a
13 duplication of other rules or regulations.

14 As a consequence, Public Resources Code section 31107.1 must be construed in
15 conjunction with the subsequently enacted Government Code provisions which established the
16 OAL. When viewed in that light, respondents not only are legally prohibited from adopting
17 the procedures sought by petitioner on their own but have the legislative discretion to
18 determine whether to commence the costly, time-consuming and uncertain outcome of
19 submitting such procedures for review and approval by OAL.

20 Because mandamus will not lie to compel an unlawful act or to compel the exercise
21 of legislative discretion, petitioner's causes of action based on a purported duty under Public
22 Resources Code section 31107.1 must be dismissed and his writ request denied.

23 Assuming, however, that the Conservancy had some duty to adopt regulations, the
24 petition is still deficient because Mr. Mancuso has failed to allege any facts demonstrating
25 that he has standing to insist that the Conservancy and the Department adopt any procedures
26 for the property transactions listed in section 31107.1 or that there is a case or controversy
27 between himself and the Conservancy and the Department on this question. Nothing in his
28 pleadings or the memorandum supporting his petition suggests that the Conservancy will

1 acquire, lease, option, dispose of or engage in any other property transaction which in any
2 way affects his vital interests. Thus, petitioner has failed to show any beneficial interest in
3 obtaining the requested writ or that the failure to grant the writ will directly and immediately
4 harm his interests.

5 Finally, the data collection authorized by the Commission is categorically exempt
6 from CEQA review under 14 California Code of Regulations section 15306 and, thus, is not
7 a project within the meaning of 14 California Code of Regulations section 15378(b)(1).

8 STATEMENT OF FACTS

9
10 1. The Conservancy accepted the Easement in June 1982. (Administrative Record
11 ("A.R."), Exh. 3, p. 014.)^{2/}

12 2. The Easement runs from Pacific Coast Highway through an existing gate, driveway
13 and proposed tennis court area, past two houses and then along the walls of a steep ravine.
14 The improvements were made without Conservancy authorization and would be removed at
15 the property owner's expense. (A.R., Exh. 3, p. 014.) Since its acquisition, the Easement has
16 not been opened to public use. (Id.)

17 3. In September 1995, the Conservancy authorized an interagency management
18 agreement with the MRCA to operate and maintain several public accessways in Malibu
19 including the Easement. (See Exhibit A, pp. 015-026 of Request for Judicial Notice of
20 Official Acts of the Conservancy on January 23, 1997 (hereinafter "Exhibit A"). This request
21 for judicial notice has been filed concurrently with this memorandum.) This agreement was
22 never executed by the MRCA.

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25
26 2. In his memorandum, petitioner asserts that he has submitted to the Court the administrative record
27 certified by the Conservancy. Mr. Mancuso has, however, also served on respondents another set of documents
28 entitled administrative record. The documents in that record were not certified by the Conservancy and, in fact,
contain, in Exhibits 14 through 21, documents which were not part of the record certified by the Conservancy.
Respondents object to the admission in evidence of that purported administrative record. All references to the
administrative record by respondents are to the record certified by the Conservancy.

1 4. In April, 1996, the Conservancy staff placed on the Conservancy's agenda for its May
2 16, 1996 meeting a proposal to disburse funds to retain technical experts to determine the cost
3 of building access improvements on the Easement. (A.R., Exh. 5, p. 024.)

4 5. Notice of the staff recommendation with respect to that agenda item was faxed to a
5 Ms. McCabe who the Conservancy staff believed was acting as Mr. Mancuso's agent. (A.R.,
6 Exh. 5, p. 024.)

7 6. On May 16, 1996, the Conservancy adopted its staff recommendation and approved
8 the disbursement of funds to technical experts for the purpose of determining the cost of
9 building access improvements for the Easement. (A.R., Exh. 4, pp. 021-023.)

10 7. Pursuant to the Conservancy's authorization, an agreement with Charles I. Rauw was
11 executed on June 28, 1996. That agreement called for Mr. Rauw to prepare a topographic
12 survey of the Easement, assess the geologic and geotechnical conditions of the property and
13 how they would impact construction of improvements to the Easement, determine how the
14 improvements would be designed, prepare a design and develop a cost estimate for the design
15 taking into consideration the fact that construction materials might have to be mobilized
16 within the Easement itself. (A.R., Exh. 13, pp. 049-050.)

17 8. The contract was not implemented, in part, because petitioner refused to permit Mr.
18 Rauw on the property.

19 9. On January 23, 1997, the Conservancy, after giving notice to Mr. Mancuso's
20 attorneys, authorized the disbursement of funds to retain technical specialists to collect data
21 and evaluate the resources on the property subject to the Easement. (Exhibit A, pp. 004,
22 007.) In response to this authorization, the contract with Mr. Rauw described above has been
23 partially implemented.

24 10. On January 23, 1997, the Conservancy also amended its September 20, 1995 action
25 authorizing an interagency management and operation agreement with the MRCA by deleting
26 authorization for that agreement to include the Easement. (Id.)

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1 In this case, section 31107.1 uses the terms property transactions after enumerating
2 a list of specific transactions such as acquisitions, options to purchase, leasing and property
3 disposal. As a result, the term property transaction must be construed as limited to similar
4 transactions. Here, an authorization to enter into a data collection contract can in no sense
5 be compared meaningfully with leases, options, acquisitions or sales of real property. Thus,
6 section 31107.1 has no relationship with the Conservancy action at issue in this proceeding
7 and the Conservancy and the Department, therefore, have no duty to adopt a regulation
8 providing notice of any such proposed future actions pursuant to that section.

9 II.

10 ASSUMING ARGUENDO THAT SECTION 31107.1 MAY BE
11 APPLIED TO THE FACTS OF THIS CASE, GIVEN THE
12 SUBSEQUENT ESTABLISHMENT OF THE OFFICE OF
13 ADMINISTRATIVE LAW, THE CONSERVANCY AND THE
14 DEPARTMENT HAVE NO LEGAL ABILITY TO ENACT A
15 REGULATION ON THEIR OWN AND, IN FACT, HAVE THE
16 LEGISLATIVE DISCRETION TO DECIDE WHETHER TO
17 UNDERGO THE LENGTHY, EXPENSIVE AND UNCERTAIN
18 PROCESS OF SEEKING OAL APPROVAL OF A PROPOSED
19 REGULATION

20 Even if section 31107.1 could be applied to the facts of this case, neither the
21 Conservancy nor the Department have the legal authority, on their own, to adopt notice
22 procedures such as petitioner requests. In asking this Court to compel the Conservancy and
23 the Department to adopt notice procedures for section 31107.1 transactions, Mr. Mancuso has
24 sought to compel these agencies to adopt standards of general application. Such standards
25 are regulations within the meaning of Government Code section 11342(g). That section
26 provides, in pertinent part, as follows:

27 "'Regulation' means every rule, regulation, order, or standard of general
28 application or the amendment, supplement, or revision of any rule, regulation,
order, or standard adopted by any state agency to implement, interpret, or make
specific the law enforced or administered by it, or to govern its procedure, except
one that relates only to the internal management of the state agency."

///

1 Pursuant to Government Code section 11340.5, state agencies
2 such as the Conservancy and the Department Government Code may not:

3 "... issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin,
4 manual, instruction, order, standard of general application, or other rule, which is
5 a regulation as defined in subdivision (g) of Section 11342, unless ... it has been
6 adopted as a regulation and filed with the Secretary of State pursuant to this
7 chapter."

8 To comply with the above mentioned chapter, such regulations must be approved
9 by OAL after a lengthy, expensive and time-consuming review process. (See generally, Govt.
10 Code §§ 11343.1 through 11349.5.) OAL, in turn, under Government Code section 11349.1,
11 may refuse to approve any regulation which, among other things, it finds is unnecessary or
12 a duplication of other rules or regulations. Under Government Code section 11349(a), a
13 regulation is necessary if "the record of the rulemaking proceeding demonstrates by
14 substantial evidence the need for a regulation taking into account the totality of the record."
15 Pursuant to Government Code section 11349(f), a regulation may be considered duplicative
16 if it serves the same purpose as a state or federal statute or another regulation. Moreover,
17 if there is duplication or an overlap, the agency proposing a regulation must justify the
18 overlap or duplication.

19 As a consequence, Public Resources Code section 31107.1 must be construed in
20 conjunction with Government Code sections 11340 et seq. which established the OAL.
21 Section 31107.1 was enacted in 1978, while, section 11340 et seq. first became effective
22 more than one year later and Government Code section 11346 specifically provides that it
23 governs the adoption of regulations pursuant to "any statute heretofore or hereafter enacted."
24 When viewed in that light, respondents not only are legally prohibited from adopting the
25 procedures sought by petitioner on their own but have the legislative discretion to determine
26 whether to commence the costly, time-consuming and uncertain outcome of submitting such
27 procedures for review and approval by OAL.

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III.

BECAUSE MANDAMUS WILL NOT LIE TO COMPEL
AN ILLEGAL ACT OR TO COMPEL THE EXERCISE OF
LEGISLATIVE DISCRETION, NO WRIT MAY ISSUE
COMPELLING RESPONDENTS TO ADOPT THE
REGULATION SUGGESTED BY PETITIONER

As set forth above, petitioner has asked this Court to order respondents to perform an act they cannot lawfully perform and to exercise their legislative authority in a particular manner. Established legal principles, however, make clear that mandamus is not available to compel a respondent to perform an act which the law prohibits or which the respondent has no legal ability to perform. (Daniels v. Superior Court (1955) 132 Cal.App.2d 700.) Likewise, settled law provides that a writ of mandate will not issue to compel the exercise of legislative discretion. (United Assn. of Journeymen v. City and County of San Francisco (1995) 32 Cal.App.4th 751, 759; Skylar v. Franchise Tax Board (1986) 185 Cal.App.3d 616,624.) As a result, this Court should deny petitioner's request for a writ of mandate compelling respondents to adopt the requested regulation.

As the court held in United Assn. of Journeymen v. City and County of San Francisco, supra, 32 Cal.App.4th 759:

"When a writ of mandate is sought with respect to a governmental body, it is essential that the court determine whether the act the writ seeks to compel is a legislative act, involving the exercise of discretion, or purely ministerial. '[A] court is without power to interfere with purely legislative action, in the sense that it may not command or prohibit legislative acts[.]...The reason for this is a fundamental one--it would violate the basic constitutional concept of the separation of powers among the three coequal branches of the government.' (Citations omitted.) (Emphasis in the original.)

In this case, with the enactment of the statute establishing the OAL, respondents have the discretion to determine whether to propose the adoption of regulations. If they determine that a particular regulation is unnecessary or duplicative or if they believe that

1 OAL might find that a particular regulation would be unnecessary or duplicative, respondents
2 have the discretion not to propose adoption. Here, the existence of the notice requirements
3 of the State Open Meeting Act, Government Code section 11125 coupled with the
4 requirements of cases such as Horn v. County of Ventura (1979) 24 Cal.3d 605, provide
5 ample basis for the conclusion that no addition regulations regarding notice need be adopted.

6 IV.

7
8 **PETITIONER HAS FAILED TO DEMONSTRATE THAT HE HAS**
9 **A BENEFICIAL INTEREST IN THE ADOPTION OF**
10 **REGULATIONS PURSUANT TO SECTION 31107.1 OR THAT ANY**
11 **INTEREST HE POSSESSES WILL BE SIGNIFICANTLY INJURED**
12 **SHOULD SUCH REGULATIONS NOT BE ADOPTED. THUS, HE**
13 **IS NOT ENTITLED TO MANDAMUS RELIEF**

14 Assuming, however, that the Conservancy had some duty to adopt regulations, the
15 petition is still deficient because Mr. Mancuso has failed to allege any facts demonstrating
16 that he has standing to insist that the Conservancy and the Department adopt any procedures
17 for the property transactions listed in section 31107.1 or that there is a case or controversy
18 between himself and the Conservancy and the Department on this question. Nothing in his
19 pleadings or the memorandum supporting his petition suggests that the Conservancy will
20 acquire, lease, option, dispose of or engage in any other property transaction which in any
21 way affects his vital interests. Indeed, Mr. Mancuso concedes that he received proper notice
22 of the Conservancy's January 23, 1997 action authorizing the Rauw data collection contract
23 and fails to demonstrate that the Conservancy intends to acquire, dispose of, lease, option or
24 otherwise engage in any other property transaction affecting his vital interests without giving
25 him proper notice. Thus, petitioner has failed to show any beneficial interest in obtaining the
26 requested writ or that the failure to grant the writ will directly and immediately harm his
27 interests.

28 / / /

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/ / /

V.

**PURSUANT TO 14 CALIFORNIA CODE OF REGULATIONS
SECTION 15306, THE DATA COLLECTION CONTRACT
DECISION AT ISSUE IS CATEGORICALLY EXEMPT FROM THE
REQUIREMENTS OF CEQA**

Finally, the data collection authorized by the Commission is categorically exempt from CEQA review under 14 California Code of Regulations section 15306 and, thus, is not a project within the meaning of 14 California Code of Regulations section 15378(b)(1).

Section 15378(b)(1) specifically provides that a project under CEQA does not include "Anything specifically exempted by state law." Section 15306 provides that exemption for the data collection contract authorization at issue in this case when it states that a Class 6 exemption exists for:

"...basic data collection, research, experimental management, and resource evaluation activities which do not result in a serious or major disturbance to an environmental resource. These may be strictly for information gathering purposes, or as part of a study leading to an action which a public agency has not yet approved, adopted, or funded."

In this case, the Conservancy authorized its staff to fund a contract with Charles Rauw to provide information about the cost of placing access improvements on the Easement taking into consideration the particular geology, geotechnical and physical impediments on the site. That action fits well within the definition of a Class 6 exemption from CEQA.

Indeed, the Conservancy specifically did not want to perform the type of analysis suggested by petitioner until such time as it had information that it could actually afford to improve the Easement.

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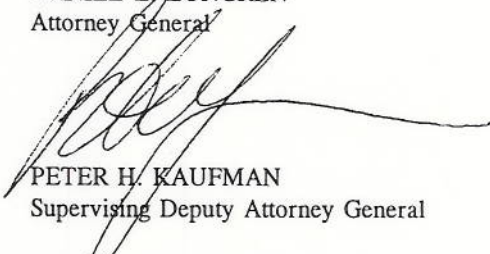
1 CONCLUSION

2
3 For all the foregoing reasons, it is respectfully requested that this Honorable Court
4 deny the petition for writ of mandate.

5 Dated: September 12, 1997.

6 Respectfully submitted,

7 DANIEL E. LUNGREN
8 Attorney General

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11 PETER H. KAUFMAN
12 Supervising Deputy Attorney General

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14 Attorneys for Respondents
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DECLARATION OF SERVICE

Case Name: *Mancuso v. Ca. State Coastal Conservancy, et al.*
L.A. Superior Court, Central Dist. No.: BS 040197

I declare:

I am employed in the County of San Diego, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, California 92186-5266.

On September 15, 1997, I served the attached

STATE COASTAL CONSERVANCY, DEPARTMENT OF GENERAL SERVICES AND MOUNTAIN RECREATION AND CONSERVATION AUTHORITY MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE PETITION FOR WRIT OF MANDATE

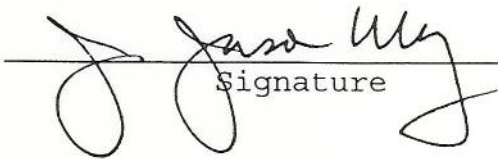
by placing a true copy thereof enclosed in a United Parcel Service Next Day Air sealed envelope thereon fully prepaid at San Diego, California, addressed as follows:

IRELL & MANELLA LLP
Allan J. Abshez, Esq.
Michael S. Lowe, Esq.
1800 Avenue of the Stars, Suite 900
Los Angeles, CA 90067-4276

Attorneys for Petitioner Frank Mancuso, Sr.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on September 15, 1997 at San Diego, California.

J. JASON MURRAY


Signature